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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SINGULAR COMPUTING LLC,)	
)	
Plaintiff)	
)	
-VS-)	CA No. 19-12551-FDS
)	Pages 1 - 80
GOOGLE LLC,)	
)	
Defendant)	

HEARING BY VIDEO

BEFORE THE HONORABLE DONALD L. CABELL
UNITED STATES MAGISTRATE JUDGE

United States District Court
1 Courthouse Way
Boston, Massachusetts 02210
August 24, 2021, 2:00 p.m.

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OFFICIAL COURT REPORTER
United States District Court
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1 A P P E A R A N C E S:

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4 Plaintiff.

5 KEVIN GANNON, ESQ., Prince Lobel Tye LLP,
6 One International Place, Suite 3700, Boston, Massachusetts,
7 02110, for the Plaintiff.

8 ANDREW BRUNS, ESQ., ANNA PORTO, ESQ., and
9 MATTHIAS A. KAMBER, ESQ., Kecker, Van Next & Peters LLP,
10 633 Battery Street, San Francisco, California, 94111, for the
11 Defendant.

12 ANANT K. SARASWAT, ESQ., Wolf, Greenfield & Sacks, PC,
13 600 Atlantic Avenue, Boston, Massachusetts, 02210, for the
14 Defendant.

P R O C E E D I N G S

THE CLERK: Okay, everyone, the Judge is about to join us. We'll be starting in a minute.

Good afternoon, Judge.

THE COURT: Good afternoon.

THE CLERK: It looks like we're all ready to begin.

THE COURT: Okay.

THE CLERK: So this is the case of Singular Computing LLC v. Google LLC, Civil Action No. 19-12551, will now be heard before this Court. Would counsel please identify themselves for the record.

MR. SEEVE: Good afternoon, your Honor. This is Brian Seeve of Prince Lobel Tye arguing on behalf of Singular Computing LLC.

THE COURT: Good afternoon.

MR. GANNON: Good afternoon, your Honor. Kevin Gannon for Singular, also of Prince Lobel.

THE COURT: Good afternoon.

MR. KAMBER: Good afternoon, your Honor. Matthias Kamber of Keker, Van Nest & Peters on behalf of defendant, Google LLC.

THE COURT: Good afternoon, Mr. Kamber.

MR. BRUNS: Good afternoon, your Honor. Andrew Bruns, also of Keker, Van Nest & Peters on behalf of Google.

THE COURT: Good afternoon.

1 MS. PORTO: Good afternoon, your Honor. Anna Porto,
2 also of Keker, Van Next & Peters, on behalf of defendant
3 Google.

4 THE COURT: And good afternoon.

5 MR. SARASWAT: Good afternoon, your Honor. Anant
6 Saraswat of Wolf Greenfield, also on behalf of Google.

7 THE COURT: Okay, and good afternoon to you. I know I
8 recognize one of the names is Court Reporter, somebody else
9 connected with my chambers, and I assume everybody else is
10 either spectating or is not arguing, so we don't need to have
11 them announce who they are.

12 All right, so there are a few different matters that
13 are pending. I'd just like to see if we put our heads down and
14 see what we can get through and resolve today. Some of these I
15 swear are things it sounds like we've talked about before in
16 part, maybe not entirely, but you guys will help me understand.

17 The first thing I have on my list is Singular's motion
18 to compel, which is at 262 on the docket. And I just want to
19 begin with respect to this one, and I'm going to ask the same
20 question with respect to any of the motions, but I'll start
21 with this one, which is, have the parties done any further
22 talking, discussing, or anything that has changed the scope or
23 narrowed the scope of what is in the motion itself?

24 MR. SEEVE: Your Honor, this is Brian Seeve on behalf
25 of plaintiff, and I don't think since this motion was filed

1 there has been any headway that has narrowed the scope of any
2 of the three topics that we raise here.

3 THE COURT: Okay. All right, so, as I understand it,
4 according to this one, following a hearing that was at the end
5 of June, Singular and an expert flew to San Francisco, and this
6 was going to be to do an inspection, and you found that none of
7 the source code specifically requested had been produced. I
8 understand you say it's relevant to the claims and defenses,
9 and you say there's little burden here, since everything is
10 going to be done through the cloud. And this is one of those
11 where I thought maybe we had talked about this, even if only
12 tangentially in talking about some other stuff, but maybe we
13 hadn't. So I don't know from Google who wants to respond to
14 this, but I guess what I'm trying to understand -- I've read
15 Google's responses in its opposition. I'm just trying to
16 understand, is this an objection in principle? Is it an
17 objection to the scope of what the inspection was going to
18 cover? Because I thought there was an understanding an
19 inspection was going to take place, people were flying out; and
20 I would have assumed that the extent of what was going to be
21 done during that visit would have been talked about and agreed
22 to ahead of time, but apparently that's not the case. So who's
23 going to respond for Google on this one?

24 MR. BRUNS: That's me, your Honor, Andrew Bruns. So I
25 do think that some of this is fairly easy to resolve, and maybe

1 it's been resolved already. So Singular requested two specific
2 sets of code in their motion. One is a variable, essentially a
3 constant value that identifies a variable in the code. And as
4 we indicated in our opposition, we don't really believe that's
5 necessary or relevant, but in order to avoid an unnecessary
6 dispute, we're happy to make that available to them.

7 THE COURT: Okay.

8 MR. BRUNS: So I think that should meet Singular's
9 concern. It is a very narrow scope, as I think you've already
10 alluded to, and it's already available on our source code
11 computer, and have offered it to them in a letter, I think
12 almost a month ago now, or maybe a little more than a month
13 ago -- maybe it's the day they filed their motion -- and never
14 heard back about their willingness to take us up on that offer,
15 but we extended again. And given the narrowness of the scope,
16 we think, you know, by the end of next week, if they can review
17 it by then, that's ample time, and, again, it's available now
18 for them to review.

19 THE COURT: Okay, so you're saying that's part of it.
20 It doesn't take care of everything that's in the motion to
21 compel. It takes care of what, two things that you think are
22 at issue?

23 MR. BRUNS: Well, I think there's a third. The third
24 we should be able to all agree and resolve rather quickly. So
25 that the second is code referred to by one of Google's

1 witnesses during his deposition. That's Dr. Jeff Dean, and in
2 that same letter I've already referred to, we made clear that
3 all such code has already been produced. Everything he
4 referred to has been produced in May, and so we don't, you
5 know, see any reason to produce anything else because there's
6 nothing more to produce. Given, however, that we've agreed to
7 allow Singular to review the first piece of code I referred to,
8 that constant representing the variable, you know, they're free
9 to look at the code again and see anything that Dr. Dean did
10 refer to, but we think that the fact that there's no more code
11 to produce essentially moots this issue as well.

12 THE COURT: Okay. And you said there was a third one.

13 MR. BRUNS: Well, so then there is a third request in
14 their motion which is not nearly so narrow as the first two
15 issues we've addressed, and so --

16 THE COURT: And before you get to that one, Mr. Bruns,
17 let me just see if Singular agrees with you on one and two,
18 that those could effectively be resolved by virtue of what you
19 have said and proposed here.

20 MR. SEEVE: So I don't think that's quite the case,
21 your Honor, and let me explain in more detail. As your Honor
22 alluded to, after our hearing in June, we went to San Francisco
23 to review the code and found that there was a substantial
24 portion of the code that had not been produced which we
25 identified to Google. And then some weeks later we came back

1 to San Francisco again, and we found that none of the code was
2 on the source code review machine, and we spoke with Google's
3 counsel, and we got some of it produced. I believe Mr. Bruns
4 has referred to some code that's been available since May.
5 There was no such code, but there is some code that has been
6 available since July 17, I think, or thereabouts, and we did
7 look at that code.

8 Now, I think Mr. Bruns mentioned three requests that
9 we have, one referring to this variable. It's a
10 num_lanes_per_tensor_core variable. We did identify that
11 variable as an example of source code that is missing from the
12 current production, merely an example of some code that we know
13 exists that is not present on the source code review machine.
14 So merely producing that one narrow variable would not actually
15 deal with any of Singular's broader requests in this case.

16 As to the Jeff Dean code that Mr. Bruns referred to,
17 what Google has produced are two files that are labeled "change
18 list file." Now, in source code terms, a change list is the
19 difference between one version of the source code and the next
20 version of the source code, specific changes that have been
21 made, so, by definition, a change list does not represent the
22 entirety of any body of source code. And so for those reasons,
23 we don't think that these sort of narrow offers by Google to
24 produce this one file here and let us review these other two
25 files that it's already produced really move any of these

1 issues or resolve them.

2 MR. BRUNS: So to respond to the second part first, we
3 have reviewed the source code computers and Singular's motion
4 and have confirmed that essentially that what Mr. Seeve just
5 said is inaccurate. It is not just the change list files. We
6 have included the code itself as well. And it's on a source
7 code computer, which again I have indicated we're willing to
8 let them look at along with the one specific piece of code that
9 they've requested in addition.

10 I'm not sure what Mr. Seeve is referring to when he
11 says a number of files that were missing. I believe there is a
12 single file that they requested in between their visits, and we
13 provided it.

14 THE COURT: He says they gave that to you as an
15 example of the sort of file that is missing, but that it wasn't
16 meant to be that's the only thing that's missing. I mean, I'd
17 love to be a fly on the wall to see some of the communications
18 that have been going back and forth because as I'm listening to
19 this, clearly things are getting lost in translation here on
20 both sides. I don't want to go back in time, but I'm just
21 curious what the mutual understanding was as to what was going
22 to happen when folks went out to San Francisco the first time
23 to do the inspection. I mean, are there not conversations that
24 take place ahead of time about exactly what code or what
25 product is going to be there to be inspected?

1 MR. SEEVE: So, your Honor, I think I can speak to
2 that. It was our understanding, Singular's understanding
3 before both of these visits that took place in July that the
4 source code that would be made available would include all of
5 the source code corresponding to the accused products in this
6 case, and that's a relatively narrow ask for source code.
7 We're not asking for any source code that's related to other
8 products or any source code that's only tangentially related to
9 each of these products. We're looking for the source code that
10 Google itself has described as the blueprint, the one and only
11 source of information that can accurately define how the
12 accused products work. It was our understanding that all of
13 the source code would be available to Singular and its expert
14 when it arrived in San Francisco, and what we found was that
15 there were large gaps in the source code that was available in
16 the source code computer, and we know that because we can see
17 source code that is available that refers to source code, other
18 source code that's missing. And one of the examples of the
19 source code we found that was missing was this variable,
20 num_lanes_per_tensor_core. We saw that source code refer to it
21 that was on the source code computer, but we didn't see where
22 that variable was defined.

23 Now, we can't give a complete list of all of the
24 missing source code files for the simple reason that we don't
25 know what they are. We expected Google to provide us with the

1 source code that corresponds to the accused products. We can
2 sleuth out and sort of deduce what files might be missing from
3 here and what files might be missing from there, but ultimately
4 we view this obligation as one that rests on Google to provide
5 us with a complete set of source code.

6 THE COURT: And I'm being driven in sort of a more
7 lineal way, which is, well, whether it's their obligation or
8 not, if there was an understanding that Google was going to be
9 making the source code available, I start from there and say
10 that if there are any issues, it should be then about resolving
11 the issues so that what the parties agreed was going to happen
12 can happen. So I don't want to revisit whether Google should
13 be obligated to make the source code available, but, Mr. Bruns,
14 if it is something you agreed to and they are able to
15 articulate why there are gaps, I mean, the conversation should
16 be, "All right, how do we fill those gaps?" You know, "Help us
17 understand if something is missing, and let's rectify it."

18 MR. BRUNS: Sure, your Honor. I just want to clarify
19 one thing which I think is important, that there was no such
20 understanding that we would be producing all source code that
21 corresponds to the accused products, and I think that's all
22 that the local rules require; it's not what a number of cases
23 that we cited in our brief that Singular has addressed.

24 THE COURT: Not to cut you off, but that's why I asked
25 the question. What's the understanding? I mean, before people

1 got on a plane, surely there had to be some conversation so
2 that, "Hey, just so we don't all be disappointed and, you know,
3 we end up getting upset and you guys thinking that, you know,
4 you didn't have to do this, let's make sure we're on the same
5 page. We're coming up there next week. This is what we expect
6 to be able to look at. Do you guys agree?" Was there a
7 conversation to that extent, to that degree where somebody
8 could show me something, correspondence, emails, and I could
9 agree, "Ah, yes, here is what the parties apparently at this
10 moment in time agreed was going to happen during that visit"?
11 Is there something like that?

12 MR. BRUNS: I think that our briefing includes some of
13 that correspondence, but the point I was trying to make was
14 that -- well, let me scratch that. I think worth noting, they
15 came to review code in December as well, never raised any of
16 the issues that are coming up now. Also, the characterization
17 of this num_lanes file that we've been discussing as exemplary
18 of things that are missing is also not in Singular's brief.
19 What Google has produced here is what is consistent with the
20 local rules and the parties' communications, which is not
21 everything that corresponds to the accused products but
22 everything that is related to the infringement claims here, and
23 that's what the local rule calls for. Extrapolating from that
24 to everything in Google's code that relates to the accused
25 products is just drastically overbroad and inconsistent with

1 both the local rules and all the case law we cited.

2 We have worked cooperatively with Singular over the
3 ten months. We've had code available and produced additional
4 pieces that they have suggested were necessary, even when we
5 thought they weren't really relevant to that analysis. And so
6 the notion that we now a month after fact discovery is closed
7 need to give them all of the code that relates to every piece
8 of the accused products, regardless of their connection to the
9 relevant claims here, I think is a nonstarter.

10 THE COURT: Well, Mr. Seeve, to his point, I mean, if
11 we talk about number one and two for a moment, on number one,
12 as you've said, you don't necessarily know what you don't have
13 until you find something that either refers to it or gives you
14 some basis for understanding there's a gap. So identified
15 something; Google has said, "Fine, we'll make that available
16 for you to see." So I don't know how much more on number one
17 we can do except to say let's start with that, and you can
18 review it. And then maybe if you're sleuthing suggests there
19 are others, other gaps, other things that are missing, you can
20 bring that to Google's attention as well.

21 On number two, I understood Mr. Bruns to be saying
22 they are prepared to make the code referred to by Mr. Dean
23 available anew, so you can now review it with the benefit of
24 whatever added perspective you'll get from the new material,
25 the new code in number one.

1 So, yeah, you know, maybe there have been some
2 disagreements along the way, but would you agree that for
3 number one and number two, that that probably is about as good
4 as we can do for the moment?

5 MR. SEEVE: So I wouldn't agree with that, your Honor,
6 because we have started there. We've visited now San Francisco
7 twice, and both times we've discovered that whatever standard
8 Google is using in determining what source code is relevant and
9 what source code is not, it's clearly not picking up source
10 code that's relevant. And this isn't just our opinion. This
11 is also the opinion of Google's witnesses or Google's 30(b)(6)
12 witness for technical issues, Dr. Norman Jouppi, referred to
13 source code, precisely the source code that was missing that we
14 identified as an example.

15 THE COURT: And so what are you asking? I just want
16 to make sure I understand. What is it you are seeking to
17 compel them to do?

18 MR. SEEVE: So we are seeking to compel them to
19 produce the source code that corresponds to the accused
20 products. We don't think that's an overbroad request. We
21 don't think that the local rules don't require that. We think
22 that it's actually a relatively narrow piece of source code
23 that Google can produce. There's relatively little source code
24 in the accused products that wouldn't relate to the functionality
25 that's at issue here in this case.

1 THE COURT: Mr. Bruns, what's the local rule you're
2 referring to when you say, "Hey, all we're required to do is to
3 produce code relating to the infringement claims"? So what's
4 the rule? What's the rule you're referring to? Because maybe
5 this is just going to be driven by me looking at the rules. I
6 obviously, you know, don't know anything about the code itself,
7 so --

8 MR. BRUNS: Sure. I'm referring to local
9 Rule 16.6(b) (4) (A) which Singular quotes part of in its reply
10 brief, but omits the portion that narrows the scope to what is
11 claimed in the patentee's infringement charts, which is what I
12 was referring to earlier, your Honor.

13 THE COURT: Okay.

14 MR. BRUNS: And again I just want to reiterate: The
15 notion that without identifying any specific shortcomings in
16 our source code production beyond this variable file, which,
17 again, we agree to make available to them -- it's on a computer
18 in Boston ready for them today -- without any sort of
19 justification for us to produce all of the code for these chips
20 in their entirety just is very overbroad; and we think, you
21 know, what's on a computer in Boston today should resolve any
22 concerns they have.

23 THE COURT: All right. Well, I'll take a look at the
24 rule. Honestly, I don't know as I sit here how I can make a
25 judgment either way. I'm trying to figure out, first, what the

1 parties understood the inspection was going to cover.

2 MR. BRUNS: And, your Honor, sorry, just to follow up
3 on that note, a colleague helpfully pointed me to Exhibits 7
4 and 8 in our opposition reference a list that Mr. Seeve
5 provided and then a follow-up letter we provided to him.

6 MR. SEEVE: Your Honor, I'd just like to note that
7 Mr. Bruns referred to the source code computer in Boston just
8 now, and we aren't aware that there's any source code computer
9 in Boston. One of the chief drivers of this dispute is the
10 fact that we have to go to San Francisco and our expert has to
11 go to San Francisco to even look to see whether the production
12 was sufficient. The last time we went to San Francisco, our
13 expert and I arrived on day one, and it wasn't until day two
14 that Google even put the source code that it said it would put
15 onto the source code computer. And, you know, this is borne
16 out by correspondence between Google and Singular. Even today,
17 Google says that it produced the source code by Jeff Dean in
18 its entirety. We have asked in numerous emails what file names
19 we should be looking at so they can point us to the source code
20 on the source code computer, and Google has point-blank refused
21 to tell us. So this is one of the reasons why this dispute,
22 we're loathe to just kind of, you know, take this one file and
23 then go back and see if there's more because every time we go
24 back, we have to fly to San Francisco. Mr. Bruns just referred
25 to a source code computer in Boston. That would make our lives

1 a lot easier.

2 THE COURT: Is there something in Boston, Mr. Bruns?

3 MR. BRUNS: Yes. And, your Honor, I wish Mr. Seeve
4 was -- Exhibit 8 to our opposition, which is a letter we sent
5 to him on July 23, offers Singular a source code computer in
6 Boston, and we also emailed them, I believe on August 2, to
7 reiterate that offer. So there's no dispute that they can look
8 at a source code computer in Boston.

9 MR. SEEVE: So a source code computer in Boston would
10 make this issue go more smoothly, but our expert in Texas would
11 still have to fly to Boston, and we still don't know what
12 standard Google is using to determine whether source code that
13 corresponds to the accused products in this case is or is not,
14 quote, as they say "relevant to the infringement claims." If
15 we look at the local rules and the local Rule 16.4(c) that
16 Mr. Bruns specifically referenced, there's no such limitation
17 that limits the source code to specific arguments made in claim
18 charts or elsewhere. It's source code that is sufficient to
19 disclose the operation of the accused products.

20 MR. BRUNS: Sorry, Mr. Seeve. Did you say 16.4(c)?
21 That's not what I said.

22 MR. SEEVE: I'm sorry. What did you say?

23 THE COURT: 16.6(d) (4) (A) .

24 MR. BRUNS: And I have it pulled up right here. It
25 says it limits it to the functionality identified in the

1 patentee's infringement claim charts.

2 THE COURT: And I have to tell you both, if when we're
3 done and we go back and we debrief and we talk about this I'm
4 still unable to really understand the difference between what
5 Singular is seeking and what Google is prepared to offer and
6 what's kind of missing in the middle, I am going to be guided,
7 at least initially, by the rule. I mean, Google has to comply
8 at least with the rule. That's the minimum.

9 Now, I don't necessarily think that the rule means
10 therefore, once you comply with that, you're done and there's
11 never a need to go beyond it; but I think I would have to
12 understand, Mr. Seeve, what beyond what the rule calls for is
13 missing and then its relevance here. And I understand you to
14 be saying there's really no burden to them, but I'd need to
15 understand its relevance here.

16 And I guess, Mr. Bruns, that would ultimately mean
17 whether you are or are not providing access to source code
18 relating to the accused product. And if you say "We're not,"
19 well, then I can at least, you know, proceed with that
20 understanding.

21 MR. BRUNS: Can you repeat that?

22 THE COURT: I hear Mr. Seeve to be saying, drawing the
23 distinction between code relating to the accused product versus
24 the infringement claims, as though one is narrower and one is
25 broader, and that maybe what you guys are doing is narrowing

1 the scope of what you are giving them access to inspect.

2 MR. BRUNS: Well, I think that is a fair description,
3 your Honor, that it's narrower in scope than all of the code
4 for the entirety of the chips on which the, you know, much
5 narrower claims are targeting a specific portion of. I just,
6 you know, before we turn away from this, I just want to
7 reiterate: We produced all the code related to the accused
8 functionality, so exactly what the rule calls for, in November.
9 They reviewed it multiple times in December. They never raised
10 any issue with any shortcomings until July. You know, on the
11 eve of the close of fact discovery, they identified a single
12 file in the brief that we have agreed to produce, and I think
13 previously requested a single file which we supplemented our
14 production to respond to. So I think what we've done is
15 consistent with the rules and what the parties had agreed to
16 beforehand, and these eleventh-hour requests for an incredibly
17 broad production of all of the code for things that are
18 irrelevant here is just not proper, and for all the reasons
19 identified in our brief and the cases we've cited therein.

20 THE COURT: All right, so let's turn to the third one.
21 We've talked the first two to death. There was a third one I
22 don't think we --

23 MR. BRUNS: Well, I think the third -- sorry, your
24 Honor -- I think the third is what we were just discussing.

25 THE COURT: Oh, it is.

1 MR. BRUNS: So the two specific issues, which I think
2 are largely resolved, the source code referred to in the
3 deposition, which is available, again, on a source code
4 computer in Boston; the specific file they've requested, which
5 again is available on that computer, and, like I said, I think
6 maybe a week and a half, just given the scope of what's left to
7 review.

8 The third issue is just then the catchall that
9 Singular has added to its brief asking for all of the code,
10 regardless of its relationship to the actual accusations in the
11 case.

12 THE COURT: All right, on that third point, Mr. Seeve,
13 are you looking for all code regardless of whether it's, you
14 know, linked to the accused product, or is that just kind of a
15 boilerplate phrase just in case the clever lawyer might try to
16 parse the comma and say you didn't ask for something that you
17 really thought you were looking for?

18 MR. SEEVE: So it's not a very broad category of code
19 as Mr. Bruns is suggesting it is. The code that corresponds to
20 the accused products, which, as Google has said, is the only
21 way that we can determine how the accused products work, is the
22 code that corresponds to this chip. And this chip, all it
23 does, broadly speaking, is what the claim of the patents in
24 suit talks about. But for them to snip off this file here and
25 that file here under the claim that it's not relevant to our

1 infringement claims, well, that's clearly wrong, as we've shown
2 with a number of files that we've found to be relevant that
3 their witnesses have testified about. And given the fact that
4 we don't know what files they might be holding back that we
5 don't have these references to, we don't see, you know, why
6 they would be permitted to use their own private standard of
7 relevance in determining what we can and can't see, especially
8 given the fact that we have no way of knowing the universe of
9 code at that point.

10 THE COURT: So it does no good for me to enter
11 something that says "Google has to allow you to inspect all
12 source that corresponds to the accused product" because it
13 doesn't matter; you say that includes the entire chip, and
14 Google says it doesn't, right? Am I getting that right?

15 MR. BRUNS: I didn't hear Mr. Seeve to be saying it
16 doesn't include the whole chip. I think he was just saying
17 they think they need the code for the whole chip. And I just
18 want to give a little bit of context on what that type of
19 expansion would mean. Essentially they're asking us to
20 increase our production by roughly a thousand times of what we
21 have already produced, given the complexity of the chip. It's
22 not as if this is a small undertaking to expand the way
23 Mr. Seeve is suggesting. It is a substantial and unnecessary
24 expansion.

25 MR. SEEVE: So that just doesn't correspond

1 technically to the realities of the case. We're talking about
2 a chip that has three main components, all of which are
3 implicated in our infringement argument, three main components.
4 If they've produced all of the code corresponding to these
5 three components of the chip, then what is the thousand times
6 of the rest of the code that supposedly corresponds to other
7 parts of the chip?

8 We've also seen that Google's idea about what's
9 relevant and what's not is self-serving and erroneous. They
10 have several times now been informed that their source code
11 that's relevant that's missing from their source code computer,
12 and where they say, "Oh, it's not relevant, but we'll produce
13 it anyway," one time after another, eventually these dribs and
14 drabs of source code have to stop. We have a chip that has a
15 few components in it. All of those components interrelate, and
16 they're all related to the accused functionality in this case.
17 For Google to say that the accused functionality corresponds
18 only to, like, a thousandth of the source code that's comprised
19 in these chips, that's troubling in itself because it shows
20 that they're withholding a broad category of source code that,
21 in our view, must be relevant to the functionality that we
22 describe in our infringement claims.

23 THE COURT: Well, I don't know, honestly, and I don't
24 want to spend all of our time on this because we've got other
25 things, but I don't know how this gets resolved -- I'm going to

1 go back and look at it -- because, Mr. Bruns, I heard you said
2 you didn't think Mr. Seeve was saying that he wants everything
3 that corresponds to the chip. That's what I'm hearing.

4 MR. BRUNS: I was going to say I agree with you, your
5 Honor.

6 THE COURT: I don't know where I draw the line here; I
7 don't know where the balancing is. And to say that, "Yeah,
8 they're only two components but they're all interrelated, and
9 therefore we need everything," I don't know enough to know
10 whether that's a reasonable statement or not.

11 MR. SEEVE: Your Honor, I will point out that the
12 accused products in this case are boards, what are called TPU
13 boards that combine many chips and interconnects and the
14 cooling systems, et cetera, that are plugged into these
15 computers and data centers. We're not asking for everything
16 corresponding to the entire board. We have narrowed our
17 request for source code to this one chip, this actually portion
18 of a chip on a single board. There are many chips on a board.
19 We're looking at half of one of those chips, and we're saying,
20 "Please give us the source code corresponding to this part of
21 this one chip." So our request actually comes pretty narrowly
22 to exactly the source code that we think is relevant to the
23 accused products, and --

24 THE COURT: As it relates to that, Mr. Seeve,
25 Mr. Bruns, do you understand -- when Mr. Seeve says, "Look,

1 we're only looking for part of one chip," do you as you sit
2 here, do you guys understand that one part of that one chip
3 that he is looking for such that you can say, "We think that's
4 unreasonable, we think it's reasonable, we think it's overbroad
5 or not," and help me understand why?

6 MR. BRUNS: Well, I think we do understand the accused
7 functionality here, and we've produced the code that relates to
8 it. We've worked with engineers to identify the code and have
9 produced it. I just want to be very careful here with the
10 notion that, you know, the boards are the universe, and so the
11 scope of what they're now requesting is narrow. He could start
12 saying, "Google is a company that does search engines, and
13 we're not asking about the code for search engines." The
14 reality is that what he's still requesting is overbroad. He's
15 carved out something a little narrower to make it seem
16 reasonable, but what we've produced is all the code that
17 relates to the accused functionality.

18 THE COURT: Well, here's the conundrum. And I'm sorry
19 to keep interrupting, but I really don't want us just to bog
20 down on the first pending motion. The conundrum for them is,
21 you're in the driver's seat in terms of determining what you
22 think is relevant for them, and it makes them uncomfortable
23 that you're making those judgment calls because later they find
24 they don't even have the entirety of what they thought they
25 were getting from you, and they only find that by deducing from

1 what they've got that something is missing. What can we do
2 that maybe might strike somebody in the middle as more
3 objective that would allow them to do the sort of inspection
4 they're looking to do, but that doesn't necessarily, you know,
5 require just making the whole thing available because otherwise
6 we don't have a comfort level that we're getting access to the
7 nub of it?

8 MR. BRUNS: Well, I think, your Honor, we're already
9 in the process of that, short of this extra third request. We
10 made this production available in November, allowed them to
11 inspect it numerous times, and responded to any specific things
12 they felt were missing. You know, I think they took
13 depositions of our engineers. They could have asked for
14 anything relevant that they thought was missing then as well.
15 They could have inquired about the source code specifically
16 with the engineers. I just think we already have gone through
17 the process that you're identifying. There's really nothing
18 more for us to produce that is targeted in a way we've been
19 discussing.

20 THE COURT: I feel like we're sort of talking past
21 each other, but I think what they're saying is, yeah, you're
22 making that judgment call in the first instance; you're not
23 giving them the slightly broader access that they're looking
24 for that might help them agree with you but might also allow
25 them to find some stuff that they think is germane. You might

1 still disagree, but they might say, "This is kind of what we
2 were talking about." But I see Mr. Kamber wants to also wade
3 in here. What do you say, Mr. Kamber?

4 MR. KAMBER: Mr. Bruns is doing a fine job, and I
5 don't mean to interject but just try to move things forward. I
6 do think fundamentally that there's not much of a -- there's
7 not a great place to go here in terms of a compromise, which I
8 hesitate always to say. They have asked us for code; we've
9 produced a lot of code. I've talked to engineers. We put that
10 code on a computer for seven months, eight months, nine months.
11 There was no issue with the scope of that production. They
12 looked at it. They didn't say "We see missing pieces" or
13 anything along those lines. They then did say, "There's an
14 instantiation file. We see your files, but they are
15 instantiated in a certain way." And we said, "We don't think
16 that's relevant, but we'll give that to you," and we did. And
17 then they pointed out on other files this constant definition.
18 The fact that we're talking about these dribs and drabs, these,
19 like, single files where they say, "Oh, we'd like this constant
20 definition," I think shows that we've essentially reached the
21 limits or the bounds of the functionality that is accused, and
22 that we have been nothing but cooperative in trying to
23 supplement that production. To the extent that they say, "Hey,
24 there's a file here that refers to a different file, we'd like
25 to see that," we've given them that in both the instances where

1 they've been specific.

2 What we're now facing, and why I think your Honor is
3 having a difficult time with this, and I'm sympathetic, is, the
4 next request is, "Give us everything related to the chip." And
5 I also don't know where I would draw the boundary beyond what
6 we've provided and what we've been supplementally provided,
7 which, you know, already gets into what I would call the
8 "nebulous zone" and the entirety of the chip. And, you know,
9 that's something for your Honor to decide. It's not about us
10 choosing, if we're picking and choosing at this point. I think
11 we've done it. We think they've looked at it. We think
12 they've poked whatever holes they can in it and identified a
13 problem. But beyond that, I don't know what we could or would
14 do, as a practical matter, absent providing the code for the
15 entirety of the chip, which really is a large undertaking.
16 This is not -- it's not just these three components. These
17 chips are very complicated and have a lot of components, and
18 there's a lot more to it.

19 THE COURT: I'll give you the last word on this,
20 Mr. Seeve, and then I'm going to have to take this one under
21 advisement. I can give you a sense of what I'm likely to do,
22 but I'll take that under advisement. Go ahead.

23 MR. SEEVE: So I'd just like to respond to some of the
24 points that Mr. Kamber has made. You know, he admitted himself
25 that the source code that they failed to produce on the second

1 and third visits falls into what he called the "nebulous zone."
2 So he admits, even under Google's own view of this, he thinks
3 that might be relevant. "Nebulous zone" sounds like he thinks
4 that might be relevant. And, you know, we're in a situation
5 where we have to sleuth out what pieces of the code might be
6 missing, what pieces might not be missing. Mr. Kamber
7 represents that Google has been cooperative throughout this
8 process. Google has in fact been anything but. You know, we
9 arrived in San Francisco, as I said, last month, our expert and
10 I, and it took two days of peppering Google with emails before
11 we even got the code that had been promised before our visit.
12 And that two days represented the majority of the time we had
13 to review the code in San Francisco to start with. So this is
14 a situation where the reason we're seeing dribs and drabs, far
15 from what Mr. Kamber suggests, which is that the reason we're
16 seeing dribs and drabs is because the source code is
17 substantially complete in its production, we're seeing dribs
18 and drabs because Google is being very, very withholding when
19 it comes to what source code it views as relevant and what
20 source code it views as not relevant.

21 There's no need to draw a line, an arbitrary line
22 between relevance and not. There's no problem with just giving
23 us the source code corresponding to the narrow part of the
24 accused products that we've identified, this tensor portion of
25 the chip. That's what we've asked for. And by giving us that,

1 Google can avoid the need to draw this arbitrary line between
2 source code that's relevant and not relevant.

3 They say it would increase their production a
4 thousandfold. I personally find that very hard to believe, but
5 if there's a thousand times more code than what they've showed
6 us, that alone is a topic of concern for us, and we think that
7 it could be avoided simply by acceding to our request.

8 THE COURT: All right, I'm going to have to go back
9 and -- well, we'll go back, we'll look at the papers, and I'll
10 take this under advisement. Obviously there's a genuine
11 disagreement here. And I don't know, Mr. Seeve, whether they
12 would agree that splitting it as you're suggesting, which is
13 not the entire chip but just the portion we're talking about,
14 is a balance they say that is a fair balance. They say that
15 still would require them not only in terms of arguments to do
16 something that's unreasonable, but that it clearly would be
17 having them provide you with material that has nothing to do
18 with the case, and I just want to go back and reflect on that.
19 So I'm going to take this under advisement.

20 I do like the fact that there is now the capacity
21 perhaps to review material in Boston rather than San Francisco.
22 I also like the fact that to the extent there have been
23 communications back and forth pointing out things that appear
24 to be missing, Google has made an effort to make those pieces
25 available, and I hope that would continue regardless of what we

1 are doing here and what we do with the motion.

2 So with that, let's just go on to the next one, which
3 is at 266 on the docket. This is Singular's motion to modify
4 the scheduling order to take two depositions and a 30(b)(6),
5 and Singular wants to depose Johnnnny Chen and Richard Goodin,
6 and, with respect to the 30(b)(6) depo, depose the author of
7 the invalidity contentions. Has there been --

8 MR. SEEVE: Your Honor, I believe that this motion has
9 been dealt with already.

10 THE COURT: I like to hear that. Okay.

11 MR. SEEVE: Yes, I think these two we can take off
12 your plate, your Honor.

13 THE COURT: Excellent.

14 MR. KAMBER: Judge Saylor ruled on this.

15 THE COURT: Oh, he ruled on this one? Okay, because I
16 got a couple others, and maybe if he's ruled on those too, that
17 will make things easier. We crossed our wires on that one.

18 Did he rule on 244, which is a request by Google to
19 compel Singular's responses to interrogatories, requests for
20 admissions, and document production?

21 MR. KAMBER: No. To be clear, your Honor, the only
22 one that Judge Saylor kept for himself, because it dealt more
23 with the scheduling order, was 266 that he's ruled on. So
24 another one is one that --

25 THE COURT: He should be more greedy next time and

1 take them all.

2 All right, so then let's go to Google's motion here,
3 and I know that -- you know, I looked at this, and I see there
4 may be -- unless you guys have talked about some of these,
5 let's just go through each one and see if we can resolve it on
6 the spot.

7 Let me ask first for Google, since it's your motion,
8 have any of these been resolved since the motion was filed?

9 MS. PORTO: Yes, your Honor. RFP No. 17, which
10 requested Singular's financial production, Singular explained
11 in its opposition that it had already made that production.

12 THE COURT: So RFP 17 is taken care of?

13 MS. PORTO: That's right.

14 THE COURT: Okay, anything else?

15 MS. PORTO: No, your Honor.

16 THE COURT: All right, so the first one I have within
17 this is Interrogatories 22 through 24 -- and you guys can tell
18 me whether any of these are groupable such that a discussion of
19 one really encompasses another -- and this has to do with
20 Singular's alleged conception, design, and use of a number of
21 formats. And Singular appears to say that these interrogatories
22 are badly drafted, and so I don't know whether that means,
23 "Hey, we're prepared to provide you with something; we just
24 need to have a better understanding of what it is you're
25 looking for," or what. So what's the opposition then to

1 Interrogatories 22 through 24?

2 MR. SEEVE: So, your Honor, the opposition that
3 Singular has to those interrogatories rests primarily on this
4 word "conception." As you know, "conception" has a very
5 particular meaning in patent law. It refers to something you
6 do with an invention, the claimed invention. And the
7 Interrogatory No. 22, for example, asks to describe Singular's
8 alleged conception, design, and use of a 14-bit approximate
9 data type, approximate float data type. Well, that 14-bit
10 approximate float data type is not anywhere in the patent
11 claim. It's nowhere claimed in the patents. So the word
12 "conception," it's unclear where they're getting this
13 allegation that we conceived of such a data type or identifying
14 anything in this that relates to the invention.

15 The same thing goes for Interrogatory No. 23. You
16 have Singular's alleged conception of a 16-bit floating-point
17 number. Again, a 16-bit floating-point number appears nowhere
18 in the claims at issue, and --

19 THE COURT: Well, hang on, Mr. Seeve, just so I
20 understand you. Is your concern that they're asking you to
21 provide information about something that you say has no
22 connection to anything here, or is it that this word
23 "conception" is a loaded term, and if we answer it the way we
24 think they want us to answer, we're going to be providing
25 stuff -- I don't know, it's going to be asking us to reveal

1 deep and inner thinking? So what's the concern there?

2 MR. SEEVE: So I wouldn't say that it would force us
3 to reveal deep and inner thinking, but I would say that this is
4 a loaded term. And by asking us to respond to these
5 interrogatories as they are drafted now, it would imply somehow
6 that the invention that's at issue here in this case is a
7 14-bit approximate float data type or a 16-bit floating-point
8 number. We're happy for them to ask us about these data types
9 I guess in the abstract, but for them to imply, as these
10 interrogatories clearly do, that these are somehow coextensive
11 with the patent claims at issue in this case is simply not
12 correct.

13 THE COURT: Well, that sounds to me more at core than
14 about relevance. I guess I'm trying to understand still what
15 the visceral objection here is. Is it that it's going to force
16 you to acknowledge something that you shouldn't have to
17 acknowledge, that it presumes that these things exist or that
18 they have some connection to this, and you don't want to go
19 there? If the word "conception" was taken out, would you still
20 have a problem with the interrogatories?

21 MR. SEEVE: It would depend what replaced it, your
22 Honor. So currently it says "Singular's alleged conception,
23 design, and use of," and then a variety of things depending on
24 the interrogatory. Singular has never alleged that it
25 conceived of these things, either in the patent themselves nor

1 in subsequent filings. Conception is this idea, this very
2 specific idea of, you know, arriving at something yourself in
3 your mind. It's a patent-related term that we simply don't
4 allege here.

5 THE COURT: Hang on, Mr. Seeve.

6 Ms. Porto, if you get a response that says, "We've
7 never alleged anything with respect to a 14-bit or a 16-bit,"
8 are you satisfied with that? What's your rejoinder? What do
9 you come back with?

10 MS. PORTO: Your Honor, so just to be clear, Singular
11 responded that its patent's application and prosecution history
12 disclose these number formats, and specifically they said the
13 patent's application and prosecution history thoroughly
14 described their design, and that these number formats are also
15 included in presentations that Singular has produced. So this
16 idea now that Singular never claimed to have conceived of the
17 number formats is inconsistent with its current response. So
18 if Singular's position now is that it didn't conceive of the
19 formats, then certainly it should supplement its response to
20 make that clear.

21 And just to be clear, in Singular's initial response,
22 it never objected to this term "conception." Singular has also
23 served interrogatories using the term "conception." So it
24 seems that this objection to "conception" was maybe thought
25 after the initial response was submitted. But as the responses

1 currently stand, they suggest that Singular did conceive of
2 these ideas, but there was an initial problem with Singular's
3 responses that they don't make the disclosures clear enough.
4 In other words, they don't provide any citations to specific
5 portions of the patent. They don't cite by base number any
6 specific presentation. So Google's initial request was that
7 they provide more detail. Now it sounds like they're saying
8 they actually didn't conceive of these number formats, which is
9 different than what they previously said. So if that's the
10 case, we'd certainly request that they supplement their
11 response to make that clear.

12 THE COURT: Mr. Seeve?

13 MR. SEEVE: Your Honor, I think that was totally
14 incorrect. So, first of all, there's no inconsistency between
15 our response, which talks about the fact that the patent does
16 indeed disclose these number formats. And contrary to what
17 Ms. Porto says, we have provided citations to the patent
18 specification, I believe in our reply brief, which I can find
19 in a moment. But they very clearly describe data formats that
20 include the data formats that are at issue here. And to say
21 that we've served interrogatories that use the term "conception"
22 and therefore we shouldn't have a problem with it in these
23 interrogatories, well, as we said, "conception" is a very
24 specific patent-related term, and it can have a proper place in
25 interrogatories as we used it properly. It's not properly

1 here.

2 And to say that our previous responses to these
3 interrogatories are somehow inconsistent with what we're saying
4 here is simply not correct. It was clear sort of what
5 information Google might be looking for with these
6 interrogatories, and we provided it. We state that the patents
7 disclose these data type formats, and we provided specific
8 portions of the patent that disclose these data type formats.
9 We cited to presentations that Mr. Bates gave at Google and
10 said that the data type formats were at least implicitly
11 disclosed in those presentations, as were the patents in suit
12 themselves referred to.

13 So we are not withholding information about these data
14 type formats. What we are objecting to is this inclusion of
15 the word "conception," which is trying to sort of add
16 something, set up a straw man as to what the invention is at
17 issue in this case.

18 THE COURT: I do not follow. I'm sorry, I'm just not
19 following you. Now, first of all, when I asked you a few
20 minutes ago, if the word "conception" were removed, would you
21 have an issue and you said you might, and I don't quite
22 understand it. But more generally, if what you told me is
23 true, that previously you've provided them information, you've
24 shown them where in the record things can be found, I'm trying
25 to figure out, so what's the "there" there? What is this

1 about? I don't understand. So now you don't like the word
2 "conception," fine. If the word "conception" is taken out, is
3 this a nonissue now? If it isn't, what still remains,
4 Mr. Seeve, that you would have a problem with such that you
5 might still be objecting to these three interrogatories?

6 MR. SEEVE: Your Honor, if the word "conception" were
7 replaced with the word "disclosure," I think Singular would
8 have no problem with this interrogatory, and indeed in its
9 responses already answered it.

10 THE COURT: All right. Now, to Google, if the word
11 "conception" were removed and replaced with "disclosure," would
12 that change for Google what it was seeking through this
13 interrogatory, or would you say, "Yeah, I mean, these were just
14 terms that were used, and they've used this word before, but
15 otherwise, yeah, no big deal"?

16 MS. PORTO: Yes, your Honor, Google is specifically
17 asking about Singular's conception and whether Singular alleged
18 that it conceived of these particular number formats. And just
19 to be clear, in Singular's response, it doesn't simply say that
20 the patents disclose the number of formats. It says that the
21 patents teach the number of formats and thoroughly describe
22 their design. So I interpret that response to mean that
23 Singular's position is that it did conceive of these number
24 formats, as exemplified by the patent. And if that's not what
25 Singular is saying anymore, then it should supplement its

1 response to make that clear. And if Singular is struggling
2 with the definition of "conception," in its objections it can
3 provide a definition of "conception" that it's going to use and
4 respond based on that definition, as is customary in discovery
5 responses.

6 THE COURT: And just complete a sentence for me to
7 help me understand how it matters either way if Singular were
8 to say it did or it did not conceive of these. If they said,
9 "Yeah, either we did conceive or we did not conceive," how does
10 it matter either way? Just help me understand from Google's
11 perspective.

12 MS. PORTO: Sure, your Honor. So the specific number
13 formats that are asked about in these interrogatories are
14 number formats that Singular claims are used in the accused
15 products and also that are used in the practicing products. So
16 obviously Google is interested in whether or not Singular
17 contends that it conceived of and developed the number formats
18 that it's now accusing Google of infringing.

19 THE COURT: Okay. So that strikes me, as a pedestrian
20 who doesn't normally do this stuff every day, Mr. Seeve, to be
21 reasonable, right? I mean, it goes really to your own claim.
22 They're asking you to basically acknowledge whether you are or
23 are not making a certain contention, in so many words. So I'm
24 still trying to understand what's problematic with asking
25 Singular to respond to this as framed.

1 MR. SEEVE: So there are two problems, your Honor.
2 First of all, this word "conception" means more than teach and
3 disclose, and Google is sort of eliding those terms and saying
4 that, well, if they teach and disclose, so they're interpreting
5 that to mean conception. Well, that's simply not true. We
6 mean teach and disclose.

7 Conception is something you do with an invention. A
8 full claim, you can see the invention that backs that claim.
9 What they're referring to is a particular embodiment of a
10 particular limitation of a patent claim, and they're saying
11 Singular alleges that it conceived of that. That just doesn't
12 make sense. Singular never alleged that it conceived of that,
13 but we can say that Singular doesn't allege that it conceived
14 of that because --

15 THE COURT: Well, why don't you just do that? Why
16 don't you just do that? Why don't you just supplement this and
17 say, "We don't allege that we conceived of this"? And I don't
18 know whether you need to go further and say, "We didn't
19 conceive of this." I mean, I don't know why you'd have a
20 problem if you say -- if you're prepared to say, "We never
21 alleged we conceived X," why would there be a problem with then
22 just going one step further and saying, "We didn't conceive X"?

23 MR. SEEVE: Because, your Honor, we didn't conceive of
24 X. Where X is not a claim at issue in the case, it wouldn't
25 make sense. The word "conceive" in patent law refers to an

1 invention: You conceive of an invention. Here they're taking
2 a specific embodiment of a specific portion of a claimed
3 invention and saying, "Did you conceive of this particular
4 portion of this particular example of the claim?" And we would
5 have a problem saying we didn't conceive of that because it
6 sounds prejudicial for obvious reasons, and legally it makes no
7 sense.

8 THE COURT: Well, the first part I'm not too persuaded
9 by because it is what it is, right? If you didn't conceive of
10 it, then you can say, "Yeah, I didn't conceive of that, but we
11 don't think that affects the merits of our claim."

12 On the relevance part, that to me I would be more
13 intent to listen to, which is if you're saying, "Look, you're
14 asking about something that has absolutely nothing to do with
15 anything at issue in this case," that's a fundamental ground
16 for objecting and for not responding. But I didn't hear you to
17 be -- from the papers, it didn't sound like that was the
18 objection you were making. It was more, "We don't like this
19 word that's being used."

20 MR. SEEVE: It's more, your Honor, than we don't like
21 the word that's being used, and I think it's akin to the
22 precise objection you just raised, that "conception," when that
23 word is not applied to one of the claims that we have asserted
24 against Google in this case, has no legal meaning. And it's
25 not relevant to this case whether we conceived of a particular

1 example or a particular embodiment of a particular invention.
2 What's relevant is whether we conceived of the claimed
3 invention in this case, and, of course, Singular does allege
4 that it conceived of the claimed invention in this case, or
5 Dr. Bates does rather, the inventor.

6 MS. PORTO: If I might, just to help move things
7 along, we could offer synonyms for the word "conceived," if
8 that would satisfy --

9 THE COURT: Why don't you, thank you, and then you
10 guys can get back to me whether that is enough to make this
11 issue moot. And so, Mr. Seeve, why don't you just look to see
12 what the change is and whether that's something that, you know,
13 upon review you're prepared to live with.

14 MS. PORTO: Your Honor, I was just going to suggest
15 that we could ask if Singular is comfortable with the word
16 "devised" or "formulated."

17 THE COURT: All right, Mr. Seeve?

18 MR. SEEVE: So Singular in its responses used the
19 words "disclose" and "teach," which I think Ms. Porto alleged
20 are synonyms for what she views as conception, and we would be
21 fine with the words "teach" and "disclose."

22 THE COURT: That is a statement. The question was,
23 would you be okay with "devise" and "formulate"?

24 MR. SEEVE: So they're not words that we chose in our
25 responses. They're not words that we --

1 THE COURT: I understand that. I understand that.
2 The question is, though, would you be okay with that? If you
3 had gotten an interrogatory that instead of having the word
4 "conception" had "devised" and "formulated," would you oppose
5 the objection, or is it something that you would have just
6 tried to respond to it as best you could, understanding those
7 words -- you know, giving meaning to those words as you
8 understand a normal person would give meaning to those words?

9 MR. SEEVE: So "devise" and "formulate" I would say
10 would not be accurate when it comes to what Singular did with
11 these data formats. We certainly taught them; we certainly
12 disclosed them. "Devise" and "formulate" sound like they're
13 stretching what we intended to say with our interrogatory
14 responses.

15 I'll say again, your Honor, we meant what we said: We
16 taught them and we disclosed them. Ms. Porto is the one who
17 said that "teach" and "disclose" she believes means conception.
18 We don't agree with that. We think they mean teach and
19 disclose, and so that's why we objected to this interrogatory.
20 It refers to an alleged conception, and we made no such
21 allegation.

22 MS. PORTO: Your Honor, just to be clear, I think
23 we're thinking about it backwards, and Mr. Seeve is trying to
24 explain what his answer meant, but we're trying to figure out
25 whether Singular came up with these number formats or not. So

1 regardless of whether that's what Singular intended in its
2 response I think is irrelevant.

3 MR. SEEVE: Well, the interrogatory does not ask
4 whether Singular conceived of these number formats. The
5 interrogatory refers to Singular's alleged conception of these
6 number formats as a foregone conclusion and then asks Singular
7 to state the basis for a contention they never made.

8 THE COURT: What if it's reformatted, rephrased to ask
9 whether you conceived of it? Are you prepared to answer that?

10 MR. SEEVE: We would answer that interrogatory. It
11 would not be a simple "yes" or "no" answer, but, your Honor, we
12 would be prepared to answer that interrogatory.

13 THE COURT: All right, so for Google, if you just kind
14 of retooled this and asked -- you know, it seems like one of
15 the problems is, you've bypassed -- you've made this
16 assumption, and so you've proceeded to step two, and you've
17 acted to kind of explain themselves; and they're saying, "We've
18 never even acknowledged that this is something we conceived
19 of." So why not just start by asking them whether they have
20 conceived of this and then seeing where we go from there?

21 MS. PORTO: Sure, your Honor, that would work. I
22 think another option would be just replacing the word
23 "conceive" with a word like less --

24 THE COURT: We tried. Nobody can come up with one.
25 So let's have you -- so let's treat this as -- you know, I'm

1 doing it, I'm modifying it now, all right? So you're going to
2 assume what these are asking in the first instance whether
3 Singular conceived of the product or the item in question.
4 Now, I don't know and I don't know whether we need to get to
5 what happens if Singular answers "yes" or "no" in a particular
6 instance, but let's just start with dealing with
7 Interrogatories 22 through 24 that way, okay?

8 I also have RFP 82 and Interrogatory 16, and so,
9 Google, let me hear from you on that.

10 MS. PORTO: Sure, your Honor. These two requests ask
11 for information about Singular's S2, which the subsequent
12 iteration of the practicing product that Singular asserts here
13 was called the S1. And Singular refused to produce any
14 documents related to the S2 other than those that were produced
15 for some other reason, or respond to Interrogatory No. 16 which
16 requested a more narrative explanation of the reasons for the
17 S2's development and any attempts to commercialize the S2. And
18 I believe that Singular's objection is based primarily on
19 relevance grounds, and Google's position is that the S2 is
20 relevant, in particular to the gross damages defenses,
21 especially in that it bears on the S1 and commercialization
22 attempts related to the S1, which are relevant to reasonable
23 royalty rates.

24 THE COURT: I'm sorry. Your voice dropped off at the
25 end. I didn't hear the end of your sentence.

1 MS. PORTO: Sure, your Honor, that's fine. The
2 commercial success of a practicing product is relevant to the
3 reasonable royalty rate, and so Google is seeking information
4 about the S2 because of the way really that Dr. Bates described
5 it in relation to the S1. So he described that the S2 would
6 share the same basic design as the S1, that it would be an
7 improvement, that it would be a better implementation, that it
8 would be smaller, consume less power. So we're really
9 interested in how those improvements bear on the shortcomings
10 of S1 and Singular's attempts to commercialize the S1.

11 THE COURT: Yes, I'm still trying to process this as
12 to why you need it.

13 MS. PORTO: Well, your Honor, if I could just give an
14 example, Mr. Oskin, who was Singular's former CEO, testified
15 during his deposition that when Singular and Dr. Bates were
16 having conversations with customers and people who they were
17 trying to license the S1, when there were difficulties with
18 those conversations, they started developing the S2 and telling
19 the customers that there would be a smaller chip, that the chip
20 would run faster, it would consume less power, it would be
21 better than the S1. So we're really interested in the
22 reasoning behind the S2 development and what that development
23 has to say about the S1. In other words, we're interested in
24 how the S2 and the motivations for it being developed beyond
25 the S1 and any shortcomings that were inherent in the S1.

1 THE COURT: All right, Mr. Seeve?

2 MR. SEEVE: So, your Honor, as Ms. Porto herself just
3 explained, the commercial success of a practicing product might
4 be relevant here. The S2 is neither of those things. It's,
5 first of all, not yet a product. It's in the very earliest
6 stages of development. The statement that Ms. Porto cited
7 about the S2 being faster and smaller and improved aren't
8 generic statements that one might make about a future product
9 that has not yet been fully designed, as is the case here. The
10 S2 has not even been fully designed, let alone implemented or
11 commercialized or sold. And, second, even if it were
12 commercialized or sold, we've given no indication that the S2
13 would or would not practice the claims of the patents in suit.
14 We've said that the S1 practices the claims of the patents in
15 suit, and we've given reasoning behind that, and we've produced
16 documents about the S1 that demonstrate that fact. When it
17 comes to the S2, the design process for the S2 isn't yet
18 sufficiently advanced even to make any statements about
19 whether, when it becomes a product, it will practice the claims
20 in suit. So it's not relevant --

21 THE COURT: I like that, but did you make a statement
22 like that? The way you just encapsulated that would help a
23 party seeking information on this to understand why you think
24 it's not relevant and why this is premature in any event. Did
25 you give a sort of response like that to Google to help them

1 understand this?

2 MR. SEEVE: Yes. We met and conferred on this topic a
3 number of times, and we exchanged emails and briefing on this
4 topic. And I know that in a number of meet-and-confers in
5 which I participated in, I specifically explained that not only
6 is it not a product, not only has it not been fully designed
7 yet, but whether it practices the claims in suit is not
8 something that we're making a statement about right here, and
9 so it's not relevant, and we explained this reasoning to
10 Google.

11 Now, this seems like a fishing expedition, plain and
12 simple, on the part of Google. This whole suit arose because
13 Dr. Bates explained his invention to Google under an NDA, and
14 we allege Google took the ideas and marketed them and turned
15 them into products and didn't pay us any licensing fees. So
16 we're understandably reluctant to take information about a
17 future product that is not yet fully designed, that bears no
18 relationship to this case whatsoever, and give Google carte
19 blanche access to all of the thoughts and motivations and
20 designs of a product that is not yet even complete.

21 THE COURT: All right, in the interest of time, I do
22 want us to move around. I'm inclined to deny the motion to
23 compel with respect to these two, but as with all of these that
24 we've been talking about today, I'm formally taking everything
25 under advisement. And it's going to be my goal ultimately to

1 enter orders that will really just give final verdicts on each
2 of these, rather than kind of drawn-out legal discussion, so
3 I'm going to have to make some judgment calls on some of these.

4 All right, so I got that one. Let's move on to the
5 next one, which is Interrogatory 26 regarding the basis for
6 Singular's allegation in the First Amended Complaint regarding
7 the testing source code, and Singular has objected.

8 MR. SEEVE: Yes, your Honor, Singular has objected to
9 this interrogatory as being based on a false premise, as our
10 briefing explains. I can go into a little more detail about
11 this.

12 THE COURT: Well, let me ask Ms. Porto, since it's
13 their motion and since she's had the benefit of hearing and
14 reading your objection, and I'm sure she's prepared to tell me
15 why that's not compelling and why I should go her way.

16 So, Ms. Porto.

17 MS. PORTO: Sure, your Honor. So just for a little
18 bit of background, Interrogatory No. 26 asks Singular for more
19 details about what they refer to as the "Singular test" in the
20 First Amended Complaint. And if you look at the First Amended
21 Complaint and the citations in Google's opening motion,
22 Singular repeatedly cites Singular's test, which it says shows
23 that the accused products satisfy the claimed error rate. So
24 what Interrogatory No. 26 is asking for is how specific
25 variables within the Singular test correspond to the accused

1 products such that it illustrates Singular's infringement
2 contentions, which Singular specifically said in the First
3 Amended Complaint.

4 Like Mr. Seeve just said, in their response to the
5 interrogatory, they said that the interrogatory was based on a
6 false premise. Now in Singular's opposition, they have
7 explained that the false premise is that Singular contends that
8 the testing source code is an accurate model of the accused
9 products. We think that by filing their First Amended
10 Complaint and repeatedly citing the Singular test, they've
11 suggested that they believed that the Singular test that they
12 relied on supported their infringement contentions because it
13 accurately reflects the accused products, and we think that
14 Singular should be required to explain that theory.

15 THE COURT: Mr. Seeve?

16 MR. SEEVE: So this testing code, as your Honor knows,
17 has been the subject of numerous motions already that Google
18 has filed and then withdrawn. Once I believe this Court
19 pointed out that Google has misapprehended the nature of the
20 test itself, and this was at a motion back in April when they
21 asked other questions about the test and demanded other
22 information that we told Google that we had already provided,
23 and this interrogatory suffers from the same problem.

24 The interrogatory says that Singular needs to state
25 its basis for alleging that the testing code is an accurate

1 model of the accused product. We've been very clear this whole
2 time about what the testing code is and isn't. The testing
3 code demonstrates that the accused products satisfy certain
4 statistical limitations that are put in place by the claims;
5 namely, the X and the Y percent limitations of the claims at
6 issue. We've explained exactly how they correspond to the X
7 and the Y, communications of the claims at issue. The testing
8 code itself is only a couple hundred lines long, and Google has
9 had it for almost a year now. So to say that we're representing
10 that this few hundred lines of testing code somehow represents
11 an accurate model of the accused product that earlier in this
12 very hearing they said was a product of thousands and thousands
13 of pages of source code is a ludicrous contention.

14 As for what the testing code is and how it works,
15 we've made that very plain. They've had their expert look over
16 it. Their expert has run the testing code and has examined its
17 output, and has verified in fact that its output matches
18 exactly the allegations that were made in the First Amended
19 Complaint. So as for this interrogatory, we're just not sure
20 what more information we could provide to Google. It's not our
21 obligation to explain source code to Google. We're not asking
22 Google to explain its own source code to us. So short of that,
23 we're not really sure what Google is asking for.

24 THE COURT: So, Ms. Porto, with that, what more are
25 you asking for?

1 MS. PORTO: Your Honor, we're asking what Singular's
2 contentions are about the testing source code that it relied on
3 in its First Amended Complaint. We're simply asking how
4 Singular believes that the testing source code that it
5 developed corresponds to the claims limitation.

6 THE COURT: So I feel like we're all speaking English,
7 but I don't understand anything because Mr. Seeve says, "Look,
8 we've explained to you everything we can and know about this.
9 We've said what it is and what it isn't." What's missing, all
10 right? What is it that they haven't said for an example? Give
11 me an example of something that they conceivably might say that
12 they haven't talked about as far as these contentions go. Just
13 so I can understand, when you say this is an incomplete
14 response, that they haven't told us everything they can, what's
15 missing?

16 MS. PORTO: Sure, your Honor. So just to be clear,
17 the entirety of their response is that the interrogatory is
18 objected to because it's based on a flawed premise, and as to
19 the source code, it speaks for itself. So Singular hasn't done
20 anything to explain why in their First Amended Complaint they
21 repeatedly said that the Singular test illustrates that
22 Google's products were infringing Singular's patents. What we
23 asked for specifically in the interrogatory was how the inputs
24 correspond to the accused inputs that are in the asserted
25 claims. And if there are particular limitations or ways that

1 Singular is unable to respond, it can explain those, but its
2 current response, which is just that the source code speaks for
3 itself, is clearly insufficient.

4 THE COURT: Okay, all right, I'll also take that under
5 consideration.

6 I'm inclined, I think, Mr. Seeve, to ask Singular to
7 do something more. You know, at a minimum, I found it helpful
8 to hear what you were saying here. That should probably be in
9 the form of a response to help Google understand as well. I
10 can understand their basis for posing the interrogatory where
11 it appears in the complaint, but I want to go back. I'm going
12 to look at the complaint itself. I'm going to look at what the
13 parties say on this. That leaves -- huh?

14 MR. SEEVE: I was just going to say "understood," your
15 Honor. I will point out just that Google has not objected to
16 any aspect of the testing code in the First Amended Complaint.
17 It hasn't pointed to any flaw that it believes is present,
18 which we could address if it were to bring up some flaw in
19 detail. If Google alleged that the testing code was
20 insufficient in some way, we would certainly be willing to
21 respond to Google's allegation; but Google has made no such
22 allegation in this case and is just asking for a blanket
23 explanation, which has sort of put us at a loss.

24 THE COURT: Okay, so that leaves then RFP 2 regarding
25 an admission that the patents in suit do not encompass

1 execution units using an 8-bit integer format, and Singular
2 appears to object on the ground that it has not yet determined
3 this? Do I understand that right? What's the nature of this
4 one?

5 MR. SEEVE: So I think, your Honor, this is another
6 interrogatory that's drafted using the sort of terms like
7 "encompass" that have unspecific meanings in patent law and
8 that don't relate actually to the subject of the interrogatory.
9 So here we're being asked whether the claims of the patent in
10 suit -- so this is sort of fundamentally a claim construction
11 exercise, you could think of it as being -- whether the claims,
12 quote, "encompass execution units using an 8-bit integer
13 format."

14 Well, the claims encompass what the claims said. You
15 know, what the claims are and are not is a major subject of
16 patent litigation, and the claim construction has been fully
17 briefed before this Court. And, you know, if there's a certain
18 term that Google thinks is related to this, then Google has yet
19 to identify it. But as for whether the claims encompass, and
20 then this language that doesn't appear anywhere in the claims
21 themselves, yes, theoretically the claims could encompass an
22 execution unit that uses an 8-bit integer format if that
23 execution unit satisfies all of the limitations of the claims
24 at issue. There might be other execution units that use an
25 8-bit integer format that don't satisfy the limitations of the

1 claims at issue, and so the claims wouldn't encompass those.
2 And so it's essentially an incomplete type of etiquette. We're
3 asked about this execution unit using an 8-bit integer format.
4 We're told nothing else about the execution unit, and then
5 we're asked whether the claims encompass it. It's pretty
6 difficult to respond.

7 THE COURT: Ms. Porto?

8 MS. PORTO: Sure, your Honor. Just to be clear, this
9 is the first that I've heard of the objection to the word
10 "encompass" specifically. In Singular's stated objections and
11 in meet-and-confers have said that it couldn't respond because
12 there is no claim construction ruling yet. So as we have
13 explained to Singular, we think they should respond to the
14 extent they can now, and if the claim construction ruling bears
15 on their response, they can supplement later as necessary.

16 THE COURT: If you had gotten an answer like the one
17 Mr. Seeve just gave me, it could, you know, provided certain
18 factors are present. It might not, you know, if it doesn't
19 satisfy other factors or other requirements; you know,
20 something a little more general. It could, it might, you know.
21 Would that have prompted a motion from Google for something
22 more, or would you have lived with that?

23 MS. PORTO: Well, your Honor, in general, I think it's
24 customary for parties to respond "yes" or "no" to a request for
25 admission, but certainly if Singular had provided more

1 information, other than that it can't answer because it lacks
2 sufficient information based on the claim construction ruling,
3 that would have been more helpful than what they did, certainly.

4 THE COURT: Yes, it seems to me, Mr. Seeve, this is
5 another instance where I think, you know, listening to you, it
6 sounds like that probably would have been an adequate response
7 to the request had it been provided, rather than just saying,
8 you know, "This is flawed, and so I'm not really going to
9 answer it," even if your answer is, "I can't give you a 'yes'
10 or 'no,' and here's why I can't give you a 'yes' or 'no,'" and
11 then providing the explanation you just gave.

12 MR. SEEVE: If that were enough, we would be willing
13 to supplement our responses to say what I just said, but I
14 actually did not hear Ms. Porto say that that would be enough.
15 I heard Ms. Porto say that they would really prefer a "yes" or
16 "no," which --

17 THE COURT: No, she did, she did, but I also think
18 what Ms. Porto said -- I thought I heard you to say you would
19 certainly want a "yes" or "no," but if it can't be answered
20 "yes" or "no," then you would want to understand why, or you
21 would want some explanation why it can't be answered that way,
22 and then we go from there. So I would say, on this one,
23 Mr. Seeve, I think you should just essentially take what you
24 said here and supplement this response to encapsulate that.

25 Again, if the question is asking for a "yes" or "no"

1 and you can't give a "yes" or "no," you begin by saying, "I
2 can't give you a 'yes' or 'no,'" and then proceeding to explain
3 why.

4 MR. SEEVE: We have no problem doing that, your Honor,
5 with the understanding that it's not going to be a "yes" or a
6 "no," that it's going to be what I said here.

7 THE COURT: Okay, that's fine, but my point is, you
8 say, "We can't give you a 'yes' or 'no,'" and then explain why,
9 okay?

10 MR. SEEVE: Uh-huh.

11 THE COURT: Okay, I think that's it then, right?

12 MR. SEEVE: Your Honor, there were a couple of
13 additional issues in Singular's motion that we haven't dealt
14 with yet, that --

15 THE COURT: Whose motion was that, Mr. Seeve?

16 MR. SEEVE: The same motion to compel that the source
17 code issues were in also raised two additional issues. Let me
18 get the docket number for your Honor.

19 THE COURT: Oh, oh, okay, you're right. This is --

20 MR. SEEVE: 262.

21 THE COURT: Yes, 262, right, the claim inspection and
22 testing. Okay, yes, all right, so let's go through those, okay.

23 MR. SEEVE: So these issues I think are hopefully
24 relatively simple compared to the issues that we've already
25 dealt with in this hearing. The first, inspection of the

1 accused products, deals with Google giving us access to a data
2 center, an operational data center where the accused products
3 are actually used. This is a case where the accused products
4 are not sold to third parties. You can't go to a store and buy
5 one. These accused products operate only within the confines
6 of Google's data centers. And, you know, Google has been
7 somewhat cagey about data centers; you know, what they cost,
8 how many of them there are, even what they are. And we think
9 it's important in this case, both for Singular and ultimately
10 for the jury, to be able to see what these data centers look
11 like and be able to understand the operation of the accused
12 products and how it fits into Google's business. And as we
13 explained in our briefing, this is related to three key issues
14 that are central to the case: Infringement, I mean, the action
15 of the accused products in the data centers, these are what
16 makes them infringing products in this case; validity because
17 the commercial success of Google's data centers drives
18 secondary considerations of nonobviousness; and also damages
19 for reasons that we've explained in previous hearings.

20 THE COURT: Right.

21 MR. SEEVE: It's the cost savings in data centers that
22 drives I think our damages theory.

23 THE COURT: And we've already green-lighted certain
24 discovery on the data centers, correct? We're not revisiting
25 any of that today?

1 MR. SEEVE: We are not, your Honor. This is simply a
2 request to inspect the data centers in which these accused
3 products operate with our expert so we can have a look for
4 ourselves as to the context in which these accused products are
5 functioning.

6 THE COURT: The devil is in the details. I'm sure
7 you've spelled it out in greater detail, but some would say
8 inspection is walking into the front door and just keep going
9 straight down the hallway, and then you walk out the back door.
10 And then others would say, you know, you peel up the carpet;
11 you look into all the nooks and crannies. What's the extent of
12 this inspection? What are you really looking to do?

13 MR. SEEVE: So I think it's somewhere in between the
14 two extremes that your Honor has identified and I think closer
15 to the first one. Really what we're looking to do is to see
16 the server X with the accused products in them, be able to
17 photograph them and have our expert examine those photographs
18 and use them as potential evidence later down the road. We're
19 not looking to disassemble anything. We're not looking to poke
20 into nooks and crannies or to obtain detailed technical
21 specifications of anything, but we do think it's important for
22 our expert, and potentially ultimately the jury, to see how
23 these accused products are used, how they fit into Google's
24 business, and how they're responsible for all of these billions
25 of dollars of revenue that Google talks about in its documents.

1 THE COURT: And if somebody goes through and you take
2 pictures, you will be able to see how the alleged accused
3 products are used in the course of Google's business?

4 MR. SEEVE: What we'll be able to see is in part a
5 mystery to us, your Honor, because we haven't yet inspected the
6 data centers, but we do think that looking at the accused
7 products, even in the general way that I just described, will
8 provide context for our expert and for the jury to understand
9 what these accused products are and how they fit into a broader
10 system of products that Google makes.

11 THE COURT: And are you looking to inspect a center
12 chosen by Google, or is it something where you're looking more
13 for kind of a sampling and looking to go through more than one?

14 MR. SEEVE: We would be willing to inspect a center
15 that Google represents is a representative data center that
16 employs the accused products as they're generally employed
17 throughout Google's operations. We're not looking for anything
18 that would be burdensome, like inspection of every single
19 Google data center or only the Google data centers that are
20 selected by us. As long as the data center is representative
21 and Google represents that it is, we would have no problem with
22 limiting our inspection to that data center.

23 THE COURT: All right. And Google?

24 MR. KAMBER: So, your Honor, Matthias Kamber on behalf
25 of Google. The motion to inspect the data center should be

1 denied for both practical and procedural reasons here. Let me
2 start, though, with the practical reasons, which basically boil
3 down to really high burden and super low, if any, relevance to
4 the issues that even Mr. Seeve identifies here right now.
5 Notably, they aren't requesting inspection for purposes of
6 seeing the accused infringing products. We've talked about
7 that. They have samples of those accused infringing products.
8 They have the related chip architecture code. They have the
9 design documentation. They aren't saying that there's
10 something they need to see in order to prove infringement of
11 the asserted claims by way of this inspection.

12 Instead what they're saying is, "Well, we need to see
13 them in their natural habitat," in effect, "We need to see
14 them in operation." But, again, that's irrelevant to the
15 patent claims. They don't argue that it relates in any way to
16 the patent claims, and that's because the patent claims deal
17 with individual arithmetic elements in these chips that you
18 would need an electron microscope to see, and you couldn't walk
19 into a data center and see it.

20 And the bigger problem is, these chips are under heat
21 sinks. They're on boards that are in these housings. The
22 housings, by the way, we've provided Singular the full housing.
23 And then those housings are on racks in data centers, but
24 there's no indication from or looking at the housing that it
25 contains a TPU or something else. So you could walk into the

1 middle of a data center and wander around, and you'll never be
2 able to tell which one is a TPU and what houses a TPU and what
3 doesn't house a TPU. There's no label, there's no sort of
4 significant marker of this, and that's noted in the declaration
5 of a data center manager that we provided with our opposition.
6 So if you walked in, you wouldn't see anything; their expert
7 wouldn't be able to discern anything.

8 You know, in terms of burden, these are industrial
9 facilities that have a lot of heat, have high power. There is
10 mandatory safety training to go into them. During COVID, there
11 are different zones within the data centers to keep people
12 separated for continued business operation reasons.

13 They're also fundamentally incredibly sensitive
14 facilities. There's super-high security. Again, it's detailed
15 in that declaration. Google employees, essentially less than
16 one percent of Google employees will ever see the inside of one
17 of these, and most of that one percent is people who actually
18 work there. Those people have to go through metal detectors to
19 go in and out. There is a zero trust policy with respect to
20 electronic devices. Photos are not allowed in these
21 facilities, given the IP concerns. There are some photos
22 online, there's information on data centers online that I'm
23 sure Singular and its attorneys have seen. Those have all been
24 taken on Google-approved equipment and then scrubbed, or
25 they've been analyzed for purposes of determining whether or

1 not there is any sensitive IP that might be revealed by the
2 publication of those. So the idea of some random person
3 walking around freely in an industrial facility taking pictures
4 at will is pretty much the exact nightmare scenario that Google
5 has done everything to avoid by way of its security procedures.

6 So, in short, I mean, they're trying to get access to
7 one of the most sensitive areas in Google to wander freely and
8 take these photos, and that is a relief that they have not
9 identified any court as ever having given, even though, of
10 course, many Google products run on the data centers.

11 But let me try to give the procedural reason which I
12 think might be a more practical reason for your Honor to just
13 deny this motion. Rule 37 allows Singular to move to compel
14 inspection requests that were made under Rule 34. Rule 34 in
15 turn requires an inspection request that describes with
16 reasonable particularity each item or category of items to be
17 inspected, and to specify a reasonable time, place, and manner
18 for the inspection.

19 Here there was never a Rule 34 request to inspect a
20 data center, either before or after the written discovery
21 deadline. Notably, for the requests for production, Singular
22 served formal requests identifying the rules, Rule 34 and
23 Rule 26, and gave Google 30 days to respond. Similarly for the
24 interrogatories, they sent formal requests identifying Rule 33
25 and Rule 26, giving Google 30 days to respond. There never was

1 and still has never been a formal request under Rule 34. They
2 never moved the Court, as part of their request for extending
3 the fact discovery deadline, to modify the fact discovery
4 deadline or the written discovery deadline. So there's no
5 provision for this. There's nothing to enforce under Rule 37.
6 There is fundamentally no Rule 34 request for the Court to
7 actually compel or to tell us to compel us to answer because it
8 was never issued. They sent us an email shortly before the
9 close of fact discovery saying, "Hey, we'd like to come visit a
10 data center." That doesn't count. It's not a formal request.

11 And the reason this matters, of course, and I don't
12 need to be explaining this to your Honor, but courts don't want
13 to be in the business of enforcing email requests. It's bad
14 enough probably from your perspective to be in the position of
15 having to enforce formal discovery requests, but there's a
16 reason why Rule 37 requires underlying formal discovery
17 requests, and it's to avoid exactly the type of scenario we're
18 talking about here. We've cited a number of cases in our
19 brief, including the *Schwartz* case from the District of
20 Connecticut that says, without a formal request, it must be
21 denied under Rule 37; there's nothing to enforce. I think the
22 language is, "Rule 37 does not by its terms apply." And they,
23 "they" Singular, have not identified a single case where an
24 inspection would have been allowed or a request like this would
25 have been allowed without an actual underlying Rule 34 formal

1 discovery request.

2 THE COURT: All right, so I'm probably going to be
3 inclined for that reason to deny the motion to inspect, but,
4 again, I will formally take it under advisement. I'll review
5 the papers.

6 And I think then there was still an additional issue,
7 Mr. Seeve?

8 MR. SEEVE: Yes, there is. Just on the subject of the
9 inspection of the data centers, I just want to point out that
10 Mr. Kamber's arguments contradict themselves. On the one hand,
11 he's saying that inspecting a data center wouldn't be useful
12 for us; and, you know, we think you should be the judge of
13 that. But, on the other hand, he's saying that inspecting a
14 data center would potentially put them at great risk and expose
15 their IP, and those arguments seem to be in tension with each
16 other. On the one hand, you know, he's saying a walk through a
17 data center clearly doesn't show you anything, and, on the
18 other hand, he's saying it would be unduly burdensome because
19 walking through a data center exposes all their deep state
20 secrets, and that just seems, you know, squaring that circle is
21 a tough thing to do.

22 As for the Rule 34 request, we view that as a
23 formality. Google seemed to acknowledge that there was a
24 Rule 34 request in earlier stages of this litigation, and only
25 in response to this motion did it suddenly decide that this

1 formality had not been observed, and so I think --

2 THE COURT: I think the problem is that even if we had
3 started with the rule first, we would probably end up at a
4 certain point where, for the inspection to be of any value to
5 Singular, it would require that you have access at such a level
6 that the concerns raised by Google would then be true, that you
7 would be getting access to things that are sacrosanct that
8 nobody gets access to. And then on top of that, the physical
9 conditions at the centers is such that so many precautions
10 would have to be taken that the issue of burden is one we would
11 have to grapple with too.

12 So I do think at a certain level they are
13 reconcilable, those positions that he was staking out, but I'm
14 going to, again, to give both sides full benefit, review
15 everything. I'm just giving you what I'm inclined to do, and
16 then I'll do it more formally.

17 So let's then move to that last one that you have on
18 your list.

19 MR. SEEVE: So this last issue, your Honor, relates to
20 the use of a cloud TPU account to perform tests, software
21 tests, you know, that run on the hardware that's accused here.
22 Now, Google offered the use of a cloud TPU account, as our
23 briefing explains, last January and February, and we took
24 Google up on its offer and expressly said that we would like
25 access to the cloud TPU account and we would like to run tests.

1 We were unable to access the cloud TPU accounts, and Google
2 essentially told us that we couldn't. And then we reiterated
3 that request before the end of fact discovery, just last month,
4 and Google is now saying that our request is untimely and that
5 it lacks a Rule 34 basis. We think that it's an offer Google
6 made that we accepted, and Google needs to make good on its
7 offer.

8 And I would further add, just as an aside, you know,
9 we just saw Google's objections to the tests that were present
10 in the First Amended Complaint. Google doesn't actually object
11 to them in any specific way, but it's demanding explanations
12 from Singular. Running a test on the accused products
13 themselves would be one way to put these issues to bed for once
14 and for all, and the fact that Google is not allowing us or not
15 giving us access to the accused products to run tests directly
16 on the accused products sort of makes us wonder what Google's
17 purpose in objecting to these tests really is.

18 THE COURT: Well, and with Google, let me just start
19 with the first thing Mr. Seeve started with, which was, at some
20 point in the past, you had offered the cloud TPU to do these
21 tests -- that is, to run on the hardware that's at issue
22 here -- and then at a certain point changed your mind. Is that
23 correct or not?

24 MR. KAMBER: That's not correct, your Honor. We did
25 offer them -- the issue about the sample boards that your Honor

1 decided and granted their motion to compel on, our proposed
2 compromise at the time was, "In lieu of providing you the
3 sample boards and the housings, which we don't think will be of
4 much use to you, we can give you a cloud TPU account, and we
5 can give you a dummy board where the actual chip wouldn't be
6 underneath the heat sink." That was the two-pronged compromise.

7 Singular rejected that. They went ahead with their
8 motion, and then in their motion they said, "Oh, and, by the
9 way, we accept their compromise offer." In other words,
10 "We'd like to have our cake, and then we'll eat it too."

11 Your Honor recognized that. When you heard that
12 motion, and this is quoted in our briefing, your Honor asked
13 whether Singular would be fine with just a copy of the two
14 boards at issue with nothing more, including no longer the
15 offer of access to a program where you can run simulations, and
16 then they said -- I think their response was, "Well, we still
17 accept the offer of the TPU access." And I think the Court
18 recognized that was a bit underhanded and said, "Are you just
19 seeking that they provide you with copies of the boards with
20 the chips, or are you also saying, 'And I want you to compel
21 them to continue to offer us this access'?" And Singular said,
22 "Just the boards. We're not asking you to compel this access."

23 Now, since then, they seem to have opened a cloud TPU
24 account. They're commercially available. The price list is
25 available online. You can buy this service just like you can

1 buy computing from Amazon Web Services or Microsoft Azure or
2 any number of things. So they can do this. We're not
3 withholding it. They can run whatever tests they want. They
4 can run it on the hardware. You can actually select on that
5 cloud TPU site whether you want to run on a version 2 chip or a
6 version 3 chip. Both of them are accused in this case. They
7 could choose an account for each one of those to run whatever
8 tests it is that they want to run.

9 And what they're saying now is, "Well, we tried to run
10 it, and we were limited by the quota." Their briefing -- they
11 didn't say before in their letter what limit did they run into,
12 how much more do they need, what tests are they looking to run.
13 And this is the practical problem that we're facing. They're
14 now telling us that they want to compel us to provide some
15 monetary amount of cloud compute services but won't tell us how
16 much. They didn't do it in their opening; they didn't do it in
17 their reply, even after we pointed out this error. They're
18 essentially saying, "We want unlimited compute power from
19 Google to run our tests," which they don't know what they are.

20 By the way, these accounts online, some of them are a
21 few thousand dollars for a month, I think; some of them are
22 about \$2 million a month, depending on how much compute power
23 you want. I don't know what Mr. Seeve is looking for, and he's
24 never told us. He's never told the Court, for that matter.
25 What he seems to have asked the Court to order is an unlimited

1 account to run unlimited stuff that we don't know what it is,
2 and that's just simply not practical when this is a
3 commercially available commodity that they could go out and
4 buy, and probably should have some economic incentive to not
5 waste or try to take down Google's data centers.

6 THE COURT: If somebody runs into these so-called
7 quota resource issues or quota limitations, can one simply buy
8 more power or more time so they can continue, or they have to
9 start from square one again if they reached a limitation? I
10 mean, would it ruin the integrity of whatever testing they were
11 trying to do?

12 MR. KAMBER: You know, your Honor, I don't know the
13 precise answer to that, but I imagine, just as a user, that one
14 could buy more. I'm sure Google would love to sell more if it
15 had the opportunity. Mr. Seeve, frankly, may be the one most
16 knowledgeable about that because he's the one who's been in a
17 cloud TPU account who had a quota limitation, or whatever it
18 was, cited to him.

19 THE COURT: So, Mr. Seeve, what's the issue? And I'll
20 be really transparent about what I'm musing about here, which
21 is, if ultimately what Singular needed was a little more power
22 or a little more time and the cost was not substantial, whether
23 Google, in the context of this case and understanding where we
24 are, would be able to facilitate getting them that additional
25 time or power? Now, Google may say, no, go and buy it

1 yourself, I don't know, I don't care. But that's what I'm
2 wondering as a way because I am reminded, you know, based on
3 what Mr. Kamber says, that there's a history to this issue. We
4 did have this conversation, and it would seem a little unfair
5 for me to sort of switch horses midstream and compel something
6 where previously you guys said, "No, no, no, we're going to be
7 fine with Option A," and then you've undertaken yourself to do
8 this testing, which is fine; and now you're finding that when
9 you're doing it on the market, so to speak, where you have to
10 pay, there are these limitations. So why not you guys just --
11 why don't you just continue to do what you've been doing, which
12 is continuing to work with the retail side of Google's computer
13 servicing options or products to continue this testing? Why
14 should I be compelling them to do this for you, or at least to
15 give you the resources you need to complete this?

16 MR. SEEVE: So, first of all, when it comes to the
17 communication between the parties and the hearing last January,
18 I don't think that Mr. Kamber's characterization is accurate.
19 I think that Google attempted to frame these as an either/or
20 proposition: "Either you get samples of the TPU boards or you
21 get testing time." And when we said, "No, we're not accepting
22 that premise," we were not accepting the fact that it's an
23 either/or proposition. Our motion was about samples of the
24 boards, and Google said, "Well, if they would accept this
25 instead, would they agree to that?" And we said "no," we

1 wouldn't agree to that instead. This motion is about samples
2 of the boards, and that's what in this motion we were asking
3 the Court to compel, and that's what we made clear.

4 We also made it clear that we expected access to a
5 cloud TPU as well. It wasn't the subject of the motion to
6 compel, but it was something that we expected, and we made it
7 clear during that hearing, and we made it clear in subsequent
8 communication last February.

9 Now, as far as the questions about if we run into a
10 quota limit, is it possible then to simply continue, or is it
11 possible to quantify the amount of compute power that we need
12 for a test, we don't know the answers because we're not Google.

13 Now, as of yet, we have not yet, I think, bought
14 compute time on a cloud TPU service, and it is something that
15 we would expect within reason Google to provide for the purposes
16 of testing in this case.

17 Now, I say "within reason," and I don't know exactly
18 what that means in terms of the amount of computation required
19 because, again, we're not Google, and we can't make that kind
20 of determination. But if Mr. Kamber is saying that Google
21 would be willing to enter into a dialogue with us where it
22 explains how much compute power might Google be willing to
23 provide for testing in this case and how much we might need and
24 the parameters thereof, we would be happy to negotiate.

25 THE COURT: Well, I think it was I who kind of threw

1 out this idea, you know, why not just you guys sort of talk
2 about what more you might need? So I was under the impression
3 you had begun, you had run some tests, but you weren't able to
4 complete them. But you say you haven't gotten that far yet,
5 you haven't purchased anything yet, so you don't know what's --
6 so how do you know then -- I mean, so help me understand how it
7 is that you know that there's these limitations, there's this
8 issue that's keeping you from doing all the testing you would
9 want to do.

10 MR. SEEVE: So it's my understanding -- and contrary
11 to what Mr. Kamber said, it wasn't me personally who ran into
12 this quota limit, but I believe it was one of our consulting
13 experts -- it's my understanding that there's a certain amount
14 of computation that you get for free, and Mr. Kamber can
15 correct me if I'm wrong, but I believe there's a certain amount
16 of computation that's available with a free cloud TPU account,
17 and that quota was used up in our initial test. And we are
18 just looking for a little more leeway. And what a little
19 means, again, it's a subjective term, and I think we would be
20 happy to enter into a dialogue with Google about how much is a
21 little and whether compute power and compute speed mean the
22 same thing, and what we might, if anything, be willing to
23 compensate Google for this. We just want enough to be able to
24 test the accused products as thoroughly as we would like to be
25 able to test them to make sure that our infringement theories

1 are borne out in this case, and --

2 THE COURT: When you did your initial tests before you
3 ran into the limit, whoever it was on your side that was doing
4 that, was that with the assistance of Google in connection with
5 this case, or was that going to the retail side of Google and
6 purchasing or setting up an account and doing this the way any
7 person would do it in the marketplace, if that's what they
8 wanted to do?

9 MR. SEEVE: My understanding is that it was the
10 latter, that we created -- you say retail, but --

11 THE COURT: That's the term, you know, my low-brow
12 term for not -- not as part of this case but doing it the way
13 anybody else who would be interested in doing it would do it.
14 You know, that's how typically you would approach Google and
15 say, "I'd like to avail myself of this service that you guys
16 offer." So if you did it that way to begin, why not do it that
17 way to continue? It sounds like what you're essentially doing
18 is saying, "We now would like to have it done under the
19 auspices of this suit and to compel Google's assistance rather
20 than us doing it the way we started out doing it," which is
21 essentially purchasing this as a product or a service they
22 offer.

23 MR. SEEVE: Well, I think the short answer is that
24 Singular doesn't think it should have to pay for the rates to
25 test the accused products in this case that it brought against

1 Google. The right to test accused products is sort of
2 co-extensive with the right to access the accused products and
3 to get documents related to the accused products. And, as
4 Mr. Kamber said, some computations require \$2 million; some are
5 only a few thousand. We don't know which of these exactly this
6 is, but --

7 THE COURT: Why can't we figure that out? Why can't
8 we have a sense? You guys are really, really smart, and you
9 have really, really smart people working with you. We can't
10 drill down on this and get an idea of how much this would cost?

11 MR. SEEVE: So we think that in a dialogue, your
12 Honor, with Google, we would be able to explain what we're
13 looking for and how much it might cost and what the parameters
14 of that testing might look like. There's been no offer of such
15 a dialogue. Google has merely responded to our request for the
16 refusal, which is what brings us to this task here. But we
17 would, again, be happy to open a dialogue with Google about
18 exactly what amounts of testing we think would be reasonable
19 for Google to offer us in this case; but we do think that there
20 is at least a reasonable amount of testing power that we're
21 entitled to as a plaintiff in a patent infringement suit that
22 goes beyond it. I'm sorry.

23 THE COURT: No, no, that's fine.

24 To Google, I guess my question is this: Let's pretend
25 we hadn't had that history from last January that you reminded

1 me of and this were a request that were being made in the
2 context of this case, which is, "Look, we want to test, we need
3 enough to test the accused products here, so let us do that,
4 you know, as part of discovery," would you have objected on
5 principle, or would you have found a way, "Let's talk, let's
6 figure out the mechanics, let's talk about the logistics and
7 how that's going to take place"? Do you have a sense of how
8 you would have behaved then? Because if it's that, "Yeah, we
9 would have tried to work something out," I guess I'm just
10 wondering now, as the parties try to end discovery here, is
11 there a way we can just reach some sort of compromise and allow
12 this testing to take place; again, you know, not extensive, not
13 wild stuff, but enough for them to get some meaningful data for
14 purposes of the suit to test their theory?

15 MR. KAMBER: Your Honor, I hesitate to answer this way
16 and just to say that "it depends." Listen, we're always up for
17 talking. In fact, when they sent us this request for the
18 Google TPU account a week before the fact discovery deadline --
19 mind you, we had this hearing back in February; they didn't
20 raise it again until July 16. And they said we've reached a
21 quota, and we said, "Well, what quota? We don't know what
22 you're talking about." And their brief says, "When Singular
23 attempted to access the Google TPU account, however, the system
24 would not provide the quota of resources to allow Singular to
25 conduct its tests." We've been asking them. We asked in our

1 response, "What quota are you talking about? What do you need?
2 What tests do you want to run?" and they've never answered that
3 question.

4 So what they said is, they informed Google that
5 Singular needed additional access beyond what was commercially
6 available to run its tests. That's on the top of Page 9 of
7 their brief. What they have represented to the Court is that
8 they can't buy, like, there's no way to even get commercially
9 whatever quota it is that they need to run. That's troublesome
10 when there are accounts that are worth \$2 million.

11 THE COURT: Well, do we need to get clarity on that?
12 Does that phrase mean not so much that Google has said, "We
13 know what you need, and that's not commercially available,"
14 but, rather, where their person used as much as you can get for
15 free, maybe that has now been kind of phrased maybe a little
16 inaptly as they can't get what's commercially available. Maybe
17 they got what was free, and that's all they got. So this is
18 not about them having been told by Google, "What you want is
19 not commercially available"?

20 MR. SEEVE: That is correct, your Honor. That is what
21 we meant to say, and I think that's a good clarification.

22 MR. KAMBER: So in terms of the quota, Mr. Seeve keeps
23 saying, "Well, they should tell us what they're willing to give
24 us, and then we'll figure it out."

25 THE COURT: Well, they say they don't know -- well, I

1 guess I'm sort of hearing both sides. I hear Singular in part
2 to be saying, "We don't know how much we need, and we don't
3 know how much it will cost."

4 MR. KAMBER: If they're saying that they know that --
5 I mean, they know their tests; they know what quota of
6 computing that test should require. I mean, I don't think --
7 this isn't a world where, you know, if they get partway through
8 a test and then they decide, like, the test that they're
9 running uses too much, then sort of what happens? I think it's
10 better for them to articulate, "We want \$10,000 of compute
11 time, and we'd like to run half of it on version 2 and half of
12 it on version 3. Please give us an allocation in our account."
13 Then we're happy to talk to them about that. But it seems a
14 little bit weird. Like, they say to conduct its tests. They
15 know what they have. They should know what it's going to
16 require, and we are more than happy to discuss with them
17 whether that amount of commercially available compute time is
18 reasonable for us to give or not reasonable.

19 But it's also not true that just by accusing something
20 of infringement, you just sort of get it for free. If I sue GM
21 for a crumple zone patent, I don't just get to get a car to
22 crash. I can maybe buy one, but you don't automatically just
23 get it.

24 THE COURT: That's why what I'm asking you guys to
25 consider is just talking because it could conceivably be -- you

1 know, this is a horrible analogy, but I'm thinking sometimes of
2 my credit card. I go to use it, and if my credit card limit is
3 \$1,000 and I want to buy something that costs \$1,010, the card
4 gets declined, and I'm thinking "Oh, my God," and it turns out
5 all I needed was \$10 more. So if you guys talk, it may turn
6 out that what Singular is looking to do, putting aside for the
7 moment whether you should be compelled to do it, if what
8 they're looking to do, whether measured in terms of power or
9 time or money, is not unreasonable, is not patently
10 unreasonable, then I would just ask you guys to talk to see
11 whether Google can facilitate --

12 MR. KAMBER: Absolutely, absolutely.

13 THE COURT: And then on that part of it, just get back
14 to me, just report back to me what you're able to do. And I
15 have to believe that just from what I've heard, we're not
16 talking about, you know, needing some major, major amount of
17 power or major, major amount of time to do something like this,
18 and that's not \$2 million to do something. Maybe I'm wrong.

19 MR. KAMBER: I hope not, but, again, we don't know the
20 tests that they want to run. Only Singular knows that, and,
21 you know, we have been and stand ready to be reasonable and to
22 provide some degree of complimentary, so to speak, compute
23 power here. But I think it's a matter of them telling us what
24 quota they think they need because these accounts are defined
25 in that way, and we can be reasonable in providing it or not.

1 We're telling them we can provide up to X, and what you want
2 beyond that, you should procure like anybody else would have to
3 on the open market.

4 THE COURT: Okay, all right, so please, yes, talk and
5 then report back to me, all right?

6 MR. SEEVE: We will, your Honor.

7 THE COURT: So otherwise what we're going to do is,
8 we're going to go back, we'll sort of collect our thoughts, and
9 then within the next couple of days we'll just kind of issue
10 sort of a tally on these pending matters. And then on this
11 last one, we'll wait for you guys to get back to us on. Okay.

12 MR. KAMBER: Yes, your Honor.

13 THE COURT: All right, thank you. So it's coming up
14 to 4:00 o'clock. Probably a good time to call it for a day
15 unless anybody has anything else to raise. Not seeing or
16 hearing anything, all right, thank you, everybody.

17 MR. KAMBER: Actually, your Honor, one thing just for
18 purposes of clearing your docket, and this may have been done,
19 but there was a motion for a protective order that we had
20 filed. We had said by way of reply brief that those issues
21 were mooted. I think you can now -- I don't know, it may have
22 already been done, so I apologize.

23 THE COURT: No. Thank you. If it hasn't been done --
24 I think we got that. I think we did at one point try to go
25 through and clear off our little gavels, sort of internal

1 signals that show us something is pending. I thought we had
2 taken care of that, but if we haven't, thank you, Mr. Kamber,
3 we will.

4 MR. KAMBER: Thank you, your Honor.

5 THE COURT: All right, and with that, thank you,
6 everybody. If I don't see folks before Labor Day, enjoy the
7 remainder of the summer.

8 MR. SEEVE: Thank you, your Honor.

9 MR. KAMBER: Thank you, your Honor. You too.

10 THE COURT: Court is in recess.

11 (Adjourned, 3:57 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 80 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action No. 19-12551-FDS,
Singular Computing LLC v. Google LLC, and thereafter by me
reduced to typewriting and is a true and accurate record of the
proceedings.

Dated this 1st day of September, 2021.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER